IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1081

JOHN N. MITCHELL and HARRY R. HALDEMAN,
Petitioners,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

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The petitioners John N. Mitchell and Harry R. Haldeman respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review the opinion and judgment of that court rendered in these proceedings on October 12, 1976.

OPINION BELOW

The per curiam opinion of the *en banc* District of Columbia Circuit (totalling 303 pages with the dissenting opinion and appendices), dated October 12, 1976, has not yet been reported. It is before this Court as a seperate appendix to the pending petition for certiorari in the companion No. 76-793, *John D. Ehrlichman* v. *United States.*

JURISDICTION

The judgment and opinion below were entered on October 12, 1976. The judgment is attached in the Appendix hereto, p. 1a. A timely petition for rehearing, filed on behalf of the petitioners Mitchell and Haldeman, was denied on December 8, 1976.[1] A copy of that denial order is attached in the Appendix hereto, p. 2a. On timely application, the Chief Justice on December 29, 1976, signed an order extending the time for filing this petition for certiorari on behalf of these two petitioners to and including February 5, 1977.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a federal court of appeals may selectively and discriminatorily refuse to formulate and apply supervisory standards of criminal justice, grounding the refusal on the uncertainties and difficulties said to result from such a formulation.

2. Whether the fair administration of criminal justice in the federal courts requires the continuance of a criminal trial, involving the principal participants in

[1] The petitioner in the companion case (No. 76-793), John D. Ehrlichman, did not seek rehearing in the court below.

the unprecedented Watergate scandal, held at a time before the effects of the massive and prejudicial pretrial publicity concerning the defendants and the Watergate affair had been dissipated.

3. Whether a motion to disqualify a trial judge under 28 U.S.C. § 144 can be denied solely because the statements in the accompanying affidavit are found "substantively insufficient to establish bias or prejudice" within the meaning of § 144.

4. Whether a defendant's right to a fair trial on federal criminal charges entitles him to remain silent, without invoking the privilege against self-incrimination, when he is subpoenaed to appear before a congressional committee and to give testimony that relates to the pending criminal charges and his defense thereto.

5. Whether a continuance of a criminal trial should have been granted to allow the defendants to secure the testimony or deposition of a former President of the United States, whose testimony was deemed material to their constitutional right to present a defense.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

impartial jury of the State and district wherein the crime shall have been committed . . . to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 U.S.C. § 144:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

STATEMENT OF THE CASE

A. The Proceedings Below

The three petitioners now before this Court—Mitchell, Haldeman and Ehrlichman—were among the seven individuals named as defendants in a 13-count indictment returned in the District Court below on March 1, 1974.[2] They were charged with multiple of-

[2] The names and the fate of the other four defendants were:

1. Robert C. Mardian, whose conviction was reversed by the Court of Appeals below in a separate opinion (No. 75-1383) released simultaneously with the opinion affirming the petitioners' convictions. While a new trial was ordered as to Mardian, the charges were later dropped.

2. Kenneth W. Parkinson, who was acquitted by the jury of the charges against him.

3. Charles W. Colson, the charges against whom were dismissed following his guilty plea in another case.

4. Gordon C. Strachan, who was severed for trial with the Government's consent; but following the petitioners' trial, the charges against Strachan were dropped.

fenses arising out of what is popularly known as the "Watergate cover-up," to wit:

(1) Count One charged all seven defendants with a conspiracy (18 U.S.C. § 371) to obstruct justice, make false statements to a government agency, commit perjury and make false declarations, and defraud the CIA, the FBI and the Department of Justice.

(2) Count Two charged all defendants, except Mardian, with an obstruction of justice (18 U.S.C. § 1503) by making payments of hush money and offers of clemency, in connection with the "cover-up," the grand jury's investigation and the break-in trial.

(3) The remaining counts charged Mitchell, Haldeman, Ehrlichman and Strachan with making various specified false statements and giving false testimony under oath. Mitchell was charged in Count Three with making a false statement to FBI agents in violation of 18 U.S.C. § 1001; in Counts Four and Five with perjury before the grand jury in violation of 18 U.S.C. § 1623; and in Count Six with making false declarations to the Senate Select Committee on Presidential Campaign Activities, in violation of 18 U.S.C. § 1621. Haldeman was charged in Counts Seven, Eight and Nine with testifying falsely before the same Senate committee, also in violation of 18 U.S.C. § 1621.

The three petitioners were tried jointly with two of the other defendants, Mardian and Parkinson. The jury trial began on October 1, 1974, before District Judge John J. Sirica. The petitioners were found guilty on January 1, 1975, on all counts on which the jury had deliberated.[3] Mitchell, Haldeman and Ehrlichman were each sentenced to: (a) concurrent terms of 20 months to 5 years on Counts One and Two; (b) concurrent terms of 10 months to 3 years on each perjury count on which each had been convicted, such sentences to run consecutive to—not concurrent with—the sentences on Counts One and Two.

Thus the total of the sentences received by petitioners Mitchell and Haldeman, as well as by Ehrlichman, was imprisonment for 30 months to 8 years.

The Court of Appeals heard the appeals *en banc,* six judges participating. Oral argument was had on January 6, 1976. More than nine months later, on October 12, 1976, the Court of Appeals by a 5 to 1 division affirmed the convictions of Mitchell, Haldeman and Ehrlichman on all counts. The per curiam majority opinion was 201 pages long, while the dissenting opinion of Judge MacKinnon covered some 80 pages exclusive of appendices.

B. The Relevant Facts

Since the guilt or innocence of the petitioners is not in issue before this Court, it is unnecessary to recount or summarize the conflicting testimony presented at

[3] Counts Three and Ten, which charged Mitchell and Ehrlichman, respectively, with making false statements to FBI agents in violation of 18 U.S.C. § 1001, were dismissed on legal grounds at the close of the Government's case. The jury found Ehrlichman guilty of all other charges against him—Counts One and Two, and Counts Eleven and Twelve (perjury before the grand jury in violation of 18 U.S.C. § 1623).

the trial from which the verdicts of the jury were drawn. The majority opinion below (pp. 6-22) sets forth what it calls the "scenario" (p. 21), a summary of "the major events of the conspiracy" (p. 6, n. 8). And while the "scenario" is cast "in the light most favorable to the jury's verdict" (p. 6, n. 8), that summary does serve to recall the basic elements of the well-known Watergate scandal allegations—described by the Court of Appeals (p. 3) as charges that "amounted to an unprecedented scandal at the highest levels of government."

Indeed, the elements of this scandal are well-known to virtually all American citizens, including the members of this Court. And it is the very universality of that awareness that gives rise to the important questions now put to this Court. Those questions, which relate to the capacity of the federal judicial system to provide a fair trial to those most publicly associated with this unprecedented scandal, find their factual foundations in the following:

(1) *The pretrial publicity.* The record in this case, as well as the memory of all citizens, confirms the enormity and pervasiveness of the pretrial publicity that enveloped these petitioners. The Court of Appeals referred to such publicity as "massive" (p. 26) and as "extraordinarily extensive" (p. 27, n. 34), and Judge MacKinnon in dissent described it (p. 3) as "unequivocally unique in American history" and "unprecedented, from the opening build-up at the Senate hearings, through the Presidential pre-impeachment proceedings, and continuing up to the time of the beginning of the instant trial."

The pretrial publicity, which continued unabated for nearly two years preceding the trial, was conveyed to all the citizenry—particularly those in the District

of Columbia—by the national and local news media. The publicity about the case supplied elements of intrigue and mystery that caused suspense and invited speculation. By piecemeal revelation, a drama too bizarre for fiction was unfolded. From a small beginning, the story built slowly with ever more exciting plots and sub-plots to a mighty climax and an unprecedented denouement. The televised hearings of the Senate Select Committee and of the House Judiciary Committee, together with their reports, provided unparalleled official publicity. The resulting resignation of the President of the United States and his pardon by his successor, which occurred just prior to petitioners' trial, have no parallel in American history, let alone in terms of pretrial publicity.

These petitioners, while not the only public officials associated with the Watergate scandal, were certainly at the core of the public's perception of that scandal, being viewed as the most intimate of the President's advisers. Space does not permit a reproduction here of the countless articles, editorials, columns, cartoons and headlines, nor of the multitudinous television and radio scripts, that castigated these petitioners and suggested or asserted their guilt. As Judge MacKinnon's dissent makes plain (pp. 1-12), such perceptions were particularly evident in the District of Columbia, the area from which the veniremen were drawn. Based in large part on the extensive coverage of the Watergate affair by the two Washington newspapers,[4] more

[4] The record contains some 39 bound volumes of media accounts of the Watergate affair prior to the trial. These volumes together stretch about 6 feet high.

Several of those volumes contain clippings from the two Washington newspapers. More than 5000 of those clippings were from the period between June 17, 1972, and April 30, 1974. Judge MacKinnon's dissent below (pp. 5-7) quotes excerpts from those

than 93 percent of the residents of the District of Columbia were shown to have read or heard about the Watergate indictment and the charges against the petitioners. See the Sindlinger affidavit appended to Judge MacKinnon's dissent (App. A, pp. 81-86). Indeed, the Sindlinger survey indicated that, as a result of this massive publicity, 84 percent of the District residents who knew of the indictment and had an opinion believed the petitioners to be guilty.

All these indicia of prejudicial pretrial publicity were pressed upon the trial and appellate courts as bases for the petitioners' unsuccessful motions for a continuance or a change of venue. But the evidence contained in the Sindlinger survey was accorded no weight by Judge Sirica, a position readily affirmed by the Court of Appeals (pp. 32-33, n. 43). The main response of the courts below to the pretrial publicity factor, however, was to rely upon the trial judge's subjective reaction to the *voir dire* examination, from which he concluded after a series of perfunctory questions to the veniremen that a fair jury could be and was selected.[5] And in an amazing passage buried in a

clippings. A typical article accused Haldeman, Mitchell and Mardian of directly supervising an "elaborate continuous campaign of illegal and quasilegal uncover operations . . . since 1969." Another asserted that they did "lie and cheat and corrupt the institution of government."

[5] The jury came from a panel of 315 District of Columbia residents; they were examined first in small panels of 12 to 18 and then individually. The examinations covered some 2000 pages in the record.

With rare exceptions, all the veniremen and all those ultimately selected as jurors were shown to have been exposed to the pretrial publicity. But Judge Sirica steadfastly refused to ask the veniremen anything about the content or details of the publicity to which they had been exposed. To him, it was sufficient if a

footnote (pp. 28-29, n. 37), the Court of Appeals concluded from its own reading of the 2000-page *voir dire* examination that the pretrial publicity had been totally dissipated for the following reason:

> "The Government maintains that since '[t]he offenses charged here were not crimes of violence and passion,' but rather legally complex white collar crimes, pretrial publicity would make little impression on most citizens.[6] . . . Our own reading of the 2,000-page *voir dire* demonstrates that the Government's assessment of the public interest in Watergate matters is correct. Most of the

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venireman answered "no" to these two questions, which were repeatedly asked with some variation in wording:

> (a) Does anything you may have read or heard or discussed about this matter particularly stand out in your mind?
>
> (b) Do you know of any reason whatsoever why if you are selected to serve on this jury you feel that you could not listen to the testimony and consider the evidence and then vote for a verdict which is based solely upon the evidence and the law of the case?

[6] The Court of Appeals at this point cited pages 76-77 of the Government's brief in that Court, pertinent portions of which read:

> "The decisions in *Irvin*, *Rideau* and *Sheppard*, as well as in *Bloeth*, all involve defendants charged with violent and gruesome first-degree murders . . . Such crimes are easily comprehended by the average citizen, who generally is confident that he can judge crimes like rape and murder without the aid of all the evidence and detailed instructions on the law. By contrast, the crimes of conspiracy and obstruction of justice possess subtleties of proof unfamiliar to the layman, who, realizing his limitations, is hesitant to form an opinion that would prevent a dispassionate consideration of the evidence in light of the judge's instructions.
>
> "Moreover, white collar crimes have few lurid details and little prurient interest as compared to sex crimes, the violence of a psychopath, or sensational murders. Indeed, the *voir dire* here confirmed that the publicity had not 'captured the minds' of the jurors so that it would be impossible for them to consider the evidence objectively."

> venire simply did not pay an inordinate amount of attention to Watergate. This may come as a surprise to lawyers and judges, but it is simply a fact in life that matters which interest them may be less fascinating to the public generally."

(2) *The congressional committee testimony.* An integral and significant factor in this pretrial publicity concerned the appearance and the testimony of the petitioners before the Senate Select Committee in the summer of 1973. Such nationally televised testimony by Mitchell and Haldeman was later to form various perjury charges against them, and to buttress certain elements of the conspiracy and obstruction of justice charges. Petitioner Mitchell was also subpoenaed to testify before the House Judiciary Committee in July of 1974 in its impeachment investigation. In his appearance before these two committees, Mitchell vigorously protested that he had a constitutional right to remain silent and not reveal his defense to the charges being investigated by the grand jury in 1973, charges that had been formalized in the indictment by the time he testified before the House Judiciary Committee in 1974. This protest was renewed at the trial when the Government sought to introduce portions of Mitchell's testimony before these committees, a protest that was rejected by both the trial and appellate courts below.

(3) *The alleged bias of Judge Sirica.* Still another element in the pretrial publicity that permeated the airwaves and the newspapers was the well known activities of the trial judge, Judge Sirica, in unraveling the Watergate issue. The petitioner Mitchell, but not the petitioner Haldeman, joined with other defendants in protesting Judge Sirica's activities by

filing affidavits of bias and prejudice on the part of Judge Sirica in favor of the prosecution. 28 U.S.C. § 144. It was there alleged that Judge Sirica had (a) supervised the grand jury investigation of the defendants in the instant case and familiarized himself with much of the evidence involving them, (b) met privately with the prosecutor on at least two occasions, and (c) in the conduct of the 1973 trial of the original seven Watergate defendants (United States v. Liddy, et al., Crim. No. 72-1887, D.D.C.) had fused the prosecutorial and judicial roles by interrogating witnesses as to the involvement of others not on trial. The defendants also asked that the case be referred to the District Court's Calendar Committee for reassignment to another judge.

Judge Sirica refused the request for referral and, deeming the affidavits legally insufficient, rejected the recusal motion. *United States* v. *Mitchell,* 377 F.Supp. 1312 (D.D.C. 1974). The Court of Appeals *en banc,* with Judge MacKinnon dissenting and without holding oral argument, thereafter denied a writ of mandamus ordering Judge Sirica's disqualification. *Mitchell* v. *Sirica,* 502 F.2d 375 (App.D.C. 1974). This Court denied certiorari, 418 U.S. 955 (1974). Following the trial before Judge Sirica, the controversy over recusation was renewed on the appeal below. This time, the Court of Appeals took 24 pages to reject anew the motions to disqualify Judge Sirica (pp. 177-200).

(d) *The effort to subpoena President Nixon.* One last element in the "scenario" of the case as it reaches this Court concerns the effort of the defendants to subpoena the former President, Mr. Nixon, to testify at the trial, or at least to be deposed. The circumstances surrounding that effort are set forth in the per curiam opinion below (pp. 69-73) and in Ehrlichman's petition for certiorari (No. 76-793, pp. 10-13). Suffice it to say here that, after Judge Sirica became convinced that Mr. Nixon's health would not permit him to testify or be deposed for some time, the petitioners' motions for a continuance of the trial, until such testimony could be had, were rejected by Judge Sirica. *United States* v. *Mitchell,* 385 F.Supp. 1190 (D.D.C. 1974). Deeming the matter one within Judge Sirica's discretion, the Court of Appeals affirmed his decision on this point (pp. 69-84).

Overlying all the foregoing factors was the studied refusal of the Court of Appeals (pp. 23-33) to attempt to formulate and apply any supervisory power standard for assessing whether a fair trial or a fair jury was had in light of the overwhelming extent of the pretrial publicity. The Court of Appeals was content with the notion that, this not having been a crime of passion or a lurid murder, the constitutional standards of fairness had been satisfied. Judge Sirica's subjective and discretionary rejection of all efforts to secure a continuance of the trial, until the national passions had cooled, was thus substituted for the duty of the Court of Appeals to exercise its supervisory powers over the administration of criminal justice in the District of Columba.

REASONS FOR GRANTING THE WRIT

In his brief below (pp. 46-85), the Special Prosecutor correctly termed this "a profoundly important criminal trial" and "clearly an extraordinary case, in some respects unique." Indeed, in terms of what the Court of Appeals opinion called "an unprecedented

scandal at the highest levels of government" (p. 3) involving "massive" and "extraordinarily extensive" pretrial publicity (pp. 26, 27), this case has no parallel in American history and no precedent in the 430 volumes of the United States Reports.

The intrinsic importance of this prosecution, attested to in part by the extraordinary length of the opinion below, alone warrants the grant of certiorari. But the appropriateness of such a grant has been made even more obvious by the unusual and disturbing nature of the critical rulings of the Court of Appeals, some of which have created direct conflicts with the decisions of this Court and of other circuits.

1. The Refusal of the Court of Appeals To Formulate and Apply Supervisory Standards of Fairness Conflicts With the Decisions of This Court and Other Circuits.

The opinion of the Court of Appeals flatly states (p. 28) that in this case "it is inappropriate to attempt to formulate a supervisory power standard for concluding that a fair jury cannot be selected [in light of the pretrial publicity]." Such a pre-*voir dire* conclusion, said the court, "must depend solely on the subjective reaction of the judge who reaches it."

Thereby is raised a most significant problem in the fair administration of criminal justice in the federal courts. The decision below squarely conflicts with the decisions of this Court that hold: "Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *McNabb* v. *United States,* 318 U.S. 332, 340 (1943); and see *Rosenberg* v. *United States,* 346 U.S. 273, 287 (1953); *Mesarosh* v. *United States,* 352 U.S. 1,

14 (1956); *Grunewald* v. *United States,* 353 U.S. 391, 424 (1957); *Marshall* v. *United States,* 360 U.S. 310, 313 (1959). As was said in *Fay* v. *New York,* 332 U.S. 261, 287 (1947), over federal criminal proceedings "we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and these expressions of policy are not necessarily embodied in the concept of due process." See, e.g., concurring opinion of the Chief Justice in *Murphy* v. *Florida,* 421 U.S. 794, 804 (1975).

This "duty" to formulate and maintain "civilized standards" falls not only on this Court but on all the federal courts of appeals. *Barker* v. *Wingo,* 407 U.S. 514, 530 n. 29 (1972); *Thomas* v. *United States,* 368 F.2d 941, 944-945 (C.A. 5th, 1966). And until the decision below, no court of appeals had declined to assume that duty.[7] The refusal of the court below to accept the duty and to maintain civilized standards of criminal procedure within the District must therefore be considered in direct conflict with the host of contrary decisions in the other circuits. See *Delaney* v. *United States,* 199 F.2d, 107, 113 (C.A. 1st, 1952); *United States* v. *D'Angiolillo,* 340 F.2d 453, 546 (C.A. 2d 1964); *United States ex rel. Sturdivant* v. *State of New Jersey,* 289 F.2d 846, 848 (C.A. 3rd, 1961);

[7] As Judge MacKinnon noted in his dissent below (p. 15), the District of Columbia Circuit has recently emphasized its duty, like that of all federal appellate courts, to exercise "our supervisory power over the administration of criminal justice in this circuit." *United States* v. *Pinkney,* No. 75-2223 (App. D.C., Aug. 10, 1976, sl. op. p. 15). Other instances where the District of Columbia Circuit has recognized and implemented this duty are *United States* v. *Thomas,* 449 F.2d 1177, 1186-1187 (App. D.C. 1975); *Tate* v. *United States,* 359 F.2d 245, 252 (App. D.C. 1966).

Thomas v. *United States,* 368 F.2d 941, 946-947 (C.A. 5th, 1966); *Halwig* v. *United States,* 162 F.2d 837, 840 (C.A. 6th, 1947); *United States* v. *Wiley,* 278 F.2d 500, 503 (C.A. 7th, 1960); cf. *Natural Resources, Inc.* v. *Wineburg,* 349 F.2d 685, 692 (C.A. 9th, 1965).[8]

The Court of Appeals did attempt to justify its refusal to formulate or apply supervisory standards by asserting that (a) to formulate such standards in this case would introduce "additional unguided discretionary line-drawing and consequent uncertainty into the process of litigating controversial cases," (b) such uncertainty "would not guarantee a commensurate increase in the fairness of criminal trials," (c) however stated, a supervisory fair trial standard "could not stimulate the court to additional vigilance in protecting the defendant's right to be tried on the evidence presented in court," and (d) if an impartial jury actually cannot be selected, "that fact should become evident at the *voir dire.*" See pp. 29-31 of opinion below.

Those four propositions are highly questionable as excuses for not implementing the court's duty with respect to formulating supervisory standards. More importantly, however, these propositions are unique; no other court has recognized any such exceptions to the

[8] In its *Pinkney decision,* sl. op. p. 16, n. 50, the District of Columbia Circuit quoted the following from its earlier decision in *United States* v. *Wiley,* 517 F.2d 1212, 1218 (App. D.C. 1975): "In addition to constitutional commands, the federal appellate courts are governed in their decisionmaking by the statutory directive of 28 U.S.C. § 2106 that they shall dispose of appeals in the interest of justice. This permits and indeed counsels protection of sound substantial interests of the accused even when they do not rise to the level of constitutional protections." No reason is advanced in the opinion below for not following the directive of § 2106 in the instant appeals.

duty in question. Certainly, if these exceptions are to be allowed to stand and to do service as precedents for future prosecutions, this Court should accord the fullest consideration to them.

This Court's review of the four excuses is particularly necessary since they appear to inject a most serious element of discrimination into the administration of criminal justice in the federal courts. Why should these petitioners, of all the criminal appellants who appear before the District of Columbia Circuit, be singled out for exclusion from the benefits of having the fairness of their jury trial assessed pursuant to supervisory standards? Is it the notoriety of their offenses, or the enormity of the pretrial publicity? Is the most important trial in American political history simply too difficult, too overwhelming, for a federal appellate court to review its fairness under supervisory standards? Must the assessment of the "civilized standards of procedure" be left solely to the pre-*voir dire* "subjective reaction" of the trial judge?

2. The Decision Below Raises Important Questions Whether the Supervisory Standards of Fair Procedure Required a Continuance of the Trial in Light of the Unprecedented Pretrial Publicity.

The very enormity of the pretrial Watergate publicity, much of it caustically adverse to the petitioners, raises serious questions whether a fair trial could be had prior to a substantial dissipation of the national trauma known as Watergate. After two years of unremitting publicity and coming hard on the heels of the Presidential impeachment hearings, the resignation and the pardon, the trial of these petitioners can hardly be said to have taken place in the post-Watergate calm that now pervades the nation. The inability of the court

below to recognize the significance of the timing of this trial, an inability perhaps due to its refusal to apply supervisory standards of fair procedure, has created a series of important questions worthy of this Court's attention.[9]

A. The decision below, by its refusal to order a continuance as a supervisory answer to the massive pretrial publicity, directly conflicts with the First Circuit's decision in *Delaney* v. *United States,* 199 F.2d 107 (C.A. 1st, 1952). The nature of the pretrial publicity in *Delaney* was strikingly similar, though less intensive and prolonged, to the Watergate publicity. There, a collector of internal revenue in Boston had been removed by the President on charges of corruption, which led to his indictment. Delaney was then subjected to a highly publicized congressional committee inquiry; and his predicament was nationally exploited by newspapers, television and radio as illustrative of "The Truman Administration's Worst Scandal." Applying supervisory standards, and without reference to any *voir dire,* the First Circuit ordered a new trial on the ground that a continuance should have been granted, that it was neither right nor in harmony with the Sixth Amendment "for the United States to make him stand trial while the damaging effect of all

[9] The petitioners do not now assert, long after trial, that a mere change of venue should be ordered. Indeed, a change of venue just prior to the actual trial late in 1974 would not have avoided the impact of the pretrial publicity, which was nationwide in scope though most intense in the District of Columbia. But the petitioners do press their persistent alternative claim that a continuance should have been granted. To that end, a new trial can be ordered by an appellate court, in execution of its supervisory powers. See *Delaney* v. *United States,* 199 F.2d 107 (C.A. 1st, 1952).

that hostile publicity may reasonably be thought not to have been erased from the public mind." 199 F.2d at 114. That conclusion cannot be squared with the result below.

B. Serious problems abound in the Court of Appeals' heavy reliance on Judge Sirica's "subjective reaction" to the pretrial publicity as a substitute for the court's own formulation and application of supervisory standards. Such reliance is suspect in view of the inadequate and non-searching *voir dire* conducted by Judge Sirica, and in view of the fact that he himself was under serious allegations of bias in favor of the Wategate prosecution.[10] See page 9, fn. 5, *supra.*

But the extreme reliance placed on Judge Sirica's pre-*voir dire* and *voir dire* reactions runs counter to this Court's dictate in *Sheppard* v. *Maxwell,* 384 U.S. 333, 362 (1966), that "appellate courts have the duty to make an independent evaluation of the circumstances." And it is contrary to the ruling in *Irvin* v. *Doud,* 366 U.S. 717, 723 (1961), that it is "the duty of the Court of Appeals to independently evaluate the *voir dire* testimony of the impaneled jurors."

True, the court below did attempt to make an independent evaluation of the pretrial publicity and the *voir dire* testimony. But without having formulated supervisory standards to guide its own evaluation, the Court of Appeals not only continued to return to Judge Sirica's conclusions but evaluated the pretrial publicity

[10] One is reminded of the First Circuit's remark in the *Delaney* case, 199 F.2d at 115, that, while an appellate court should respect a trial judge's determination that the pretrial publicity was not prejudicial, "[p]ossibly appellate courts have sometimes overstrained the point in the latitude they have accorded to the determination of the trial judge on matters of this sort."

factors in a totally unreal fashion. In an almost unbelievable manner, the court transformed the traumatic pretrial publicity into "straightforward, unemotional factual accounts of events and of the progress of official and unofficial investigations." Opinion, pp. 26-27. And what the media had often portrayed as a common conspiracy to undermine the foundations and operations of the government was translated by the court into "rather legally complex white collar crimes" that made "little impression on most citizens," and virtually none on the veniremen. Opinion, pp. 28-29, n.37. This was truly "independence run riot," capped by the suggestion that pretrial publicity can be prejudicial only in the context of "crimes of violence and passion." *Id.*

No responsible supervisory standard could lead to such evaluations. In its studied effort to rewrite the Watergate affair, the court below ignored the central problem that any truly independent inquiry should have directly addressed. Was this not one of those occasions "when the inherently prejudicial nature of the material, coupled with knowledge of its wide dissemination in the community, requires the granting of relief, without elaborate soundings of community sentiment"? *ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press* (Dec. 1966), p. 126, § 3.2 commentary, citing *Delaney* v. *United States, supra,* and *People* v. *Martin,* 19 App.Div. 804, 242 N.Y.S.2d 343 (1st Dept. 1963).[11]

[11] In the *Martin* case, a change of venue was ordered because a public telecast had been made of the police questioning the two defendants at the time of arrest. The court stated that the exact figures of those who saw the telecast was not known, but "there can be no doubt that it was a very large number and that the potential for influence on possible talesmen is significant."

To put the question differently, was this not an occasion, as it was in *Rideau* v. *Louisiana,* 373 U.S. 723, 727 (1963), when the real trial, the real determination by the public of petitioners' guilt, occurred as petitioners were grilled by the Senate Select Committee before a national television audience as to their participation in the Watergate affair?[12] If so, the influence "that lurks in an opinion once formed" by the public from those hearings may be "so persistent that it unconsciously fights detachment from the mental processes of the average man" called upon to serve as a juror. *Irvin* v. *Doud, supra,* 727.

The fundamental problem raised by this prosecution was neither addressed nor answered by the court below. To paraphrase Mr. Justice Frankfurther's concurrence in *Irvin* v. *Doud,* 366 U.S. at, 729-730 (1961), the problem is whether fallible men and women can reach a disinterested verdict as to the guilt of those associated with the gravest scandal in American political history when, before they enter the jury box, "their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused."

That is a problem endemic to any widely publicized political-type trial. It is a problem that would have

[12] The then Special Prosecutor, Archibald Cox, was worried that the televising of petitioners' testimony before the Senate Select Committee would jeopardize the subsequent criminal trial. He protested to the Committee that "continued public hearings at this time would seriously jeopardize his criminal investigation and might well lead to all those guilty of Watergate offenses going free." Samuel Dash, *Chief Counsel* 145 (1976).

But Senator Ervin's response was that "I'm frank to say that with the state of crisis in the country today due to the public's loss of confidence in its government—I believe it is more vital that the public be informed of the facts right now than that some people go to jail.' *Ibid.,* 145.

been faced if former President Nixon had been brought to trial,[13] or had the assassin of President Kennedy been tried.[14] But the problem cannot be avoided here. These petitioners have been tried at a time when the impact of widespread and uncontrolled prejudicial publicity had not been dissipated. Fair administration of criminal justice demands an answer to why this prosecution was not continued until the public flames had died down.

3. The Other Important Questions Raised by the Opinion Below Deserve Consideration by this Court.

A. *The disqualification of the trial judge.* The motions to disqualify Judge Sirica were based in part on highly publicized actions and statements that in themselves added to the pretrial pattern of prejudicial publicity. But beyond that fact, in affirming the inadequacies of the affidavits accompanying the § 144 motions, the court below adopted a "methodology of resolution" that conflicts with the methodology dictated by this Court's de-

[13] It is not amiss to note that the former Special Prosecutor, Leon Jaworski, has publicly stated that because of the excessive publicity Mr. Nixon "could [not] receive a prompt, fair trial as guaranteed by the Constitution." Jaworski, *The Right and the Power* 237-238 (1976). That conclusion applies with even greater force to the petitioners who, unlike Mr. Nixon, were compelled to testify before national television audiences.

Mr. Jaworski also quotes, with seeming approval, a memorandum from Mr. Nixon's attorney that stated: "The sensation of Watergate is a hundred fold that of the Sheppard murder. But the media techniques remain the same and the destruction of an environment for a trial consistent with due process has been nationwide." *Ibid.*, 235.

[14] Because of the excessive publicity surrounding the assassination, the Report of the President's Commission on the Assassination of President Kennedy, p. 238 (1964), felt "it would have been a most difficult task to select an unprejudiced jury, either in Dallas or elsewhere."

cision in *Berger* v. *United States,* 255 U.S. 22, 33 (1921). See opinion below, pp. 177-193.

The court below, like most lower federal courts, fell into the familiar trap of approving Judge Sirica's action "in ruling on the legal adequacy of the affidavits himself" (p. 180) and then holding that the statements and actions ascribed to the judge in the affidavits "were substantively insufficient to establish bias and prejudice within the meaning of Section 144" (p. 191). But the *Berger* opinion of this Court held that the language of § 144 "directs an immediate cessation of action by the judge whose bias or prejudice is averred" upon the filing of an affidavit that merely states "the facts and the reasons for the belief that bias or prejudice exists." The Court expressly rejected the Government's contention in that case, which is the contention followed in the opinion below, that "the action of the affidavit is not 'automatic' . . . but depends upon the substance and merit of its reasons and the truth of its facts, and upon both the judge has jurisdiction to pass." 255 U.S. at 30-31. Thus *Berger* makes improper the "methodology" used below.

The *Berger* reading of § 144 has long been ignored by lower courts. Frank, *Disqualification of Judges,* 56 Yale L.J. 605, 629 (1947). This case affords an opportunity to remedy that discrepancy.

B. *The compelled congressional testimony.* The opinion below (pp. 93-104), in sanctioning the use at trial of petitioner Mitchell's testimony before congressional committees, raises an important and novel constitutional issue, never before confronted by this Court. That issue, in brief, is whether the petitioner's constitutional right to a fair trial includes the right to remain silent before congressional committees that are investigating

pending criminal charges, without invoking the Fifth Amendment privilege against self-incrimination.[15]

As noted in the opinion below (p. 93), when Mitchell appeared before these committees he was faced with the Hobson's choice of answering committee questions or stating on national television that his answers would tend to incriminate him. He did not want to invoke the privilege. But he felt compelled to answer the questions after being denied the right to remain silent as to matters that were the subjects of the pending criminal proceedings. The court below erred (pp. 93-94), however, in ascribing to Mitchell the position that he was in this manner seeking an extension of the Fifth Amendment privilege or of the *Miranda* doctrine.

The true question is this: once the prosecuting arm of government has committed itself to prosecuting a given defendant on specified charges, does the defendant's right to a fair trial in court protect him from being publicly tried on the same charges by a congressional committee? Does he have a fair trial right not to respond to any committee questions that would in effect force him to defend himself against the criminal charges, whether or not any of his answers might be incriminating? Can he effectively defend himself in the congressional arena when the committee, unlike the prosecutor, carries no burden of trying to prove guilt? Why should the defendant be forced by the committee to disgorge his defenses to the grand jury's charges?

[15] When Mitchell was subpoenaed to appear before the Senate Select Committee in July of 1973, he was a target of the grand jury investigation and was about to be indicted. When he was subpoenaed to appear before the House Judiciary Committee in July of 1974, he was under indictment.

Is such compelled testimony before the committee a form of pretrial "compulsory discovery" by the Government, condemned by this Court as being "contrary to the principles of free government"? *Boyd* v. *United States,* 116 U.S. 616, 631 (1886); and see Wright, *Federal Practice and Procedure,* Vol. 1, § 256 (1969).

Put differently, the petitioner Mitchell was given a choice by the congressional committees of either forfeiting his right to a fair trial or incriminating himself. That is "a choice between the rock and the whirlpool" (*Stevens* v. *Marks,* 383 U.S. 234, 243 (1966)), which "is the antithesis of free choice to speak out or to remain silent" (*Garrity* v. *New Jersey,* 385 U.S. 493, 497 (1967)). That conclusion renders his congressional testimony coercive and thus not admissible at the trial.

What the First Circuit said in an analogous context in *Delaney,* 199 F.2d at 114, may be relevant in answering some of these questions:

> "We think the United States is put to a choice in this matter: If the United States, through its legislative department acting conscientiously pursuant to its conception of the public interest, chooses to hold a public hearing inevitably resulting in such damaging publicity prejudicial to a person awaiting trial on a pending indictment, then the United States must accept the consequences that the judicial department, charged with a duty of assuring the defendant a fair trial before an impartial jury, may find it necessary to postpone the trial until by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed."

So it is here. If the legislative branch chooses to force a person to a public trial and to reveal his defenses to

a pending indictment—unless he publicly proclaims resort to the Fifth Amendment privilege—then the executive branch may be barred from using his statements to his prejudice.[16] And by the same token and in order to assure the defendant a fair trial, the judicial branch may be charged with the duty of assuring that such statements are not so used at the trial.

This constitutional enigma, which finds no answer in the decisions of this Court, obviously needs plenary consideration.

C. *The testimony of President Nixon.* Finally, the refusal of the courts below to give the petitioners any kind of a continuance to obtain the testimony or deposition of former President Nixon raises a most serious problem in the administration of federal criminal justice. Opinion below, pp. 69-84.

A fundamental element of due process is the right to present one's own witnesses to establish a defense. *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973); *Washington* v. *Texas*, 388 U.S. 14, 19 (1967). At the same time, to insure that justice is done in the federal courts, "it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." *United States* v. *Nixon*, 418 U.S. 683, 709 (1974).

The confluence of these basic doctrines casts doubt on the efficacy of the labored rationalizations in the opinion below for having precluded the use of Mr.

[16] Cf. Senator Ervin's statement that "it is more vital that the public be informed of the facts right now than that some people go to jail." See footnote 12, *supra*.

Nixon's testimony. While courts have undoubted discretion to assess the relevance of unavailable testimony, the lower courts' "exclusive focus on the burdens of a continuance and the likely significance of Nixon's testimony" (p. 77) should not be allowed to dim the constitutional right to present what testimony defense counsel deems to be the most effective or relevant. To place all these factors into the bottomless pit of the trial judge's discretion is to subordinate the constitutional values that the Sixth Amendment's right to compulsory process gives to the defendant. See Ehrlichman's petition for certiorari, No. 76-793, pp. 20-26.

Moreover, had the testimony of Mr. Nixon been made available, many of the uncertainties and implications of the taped White House conversations might well have been clarified or dissipated. The court below, as well as the trial court, rejected all of petitioner Mitchell's claims that these tapes were inadmissible as hearsay falling outside the co-conspirator exception. Opinion, pp. 133-138. But to counter such hearsay declarations of the principal participant in those taped conversations, petitioner Mitchell should have been allowed access to the dircet testimony of Mr. Nixon.

The situation respecting Mr. Nixon's health has apparently changed since Judge Sirica denied continuances on that basis. Since a continuance for that reason now dovetails into a continuance for reasons of pretrial publicity, a remand for a new trial would make it possible to effectuate petitioner's right to compulsory process of the witnesses of their own choosing. In any event, the relationship between that right and the court's discretionary power to make the right ineffective, needs exploration by this Court.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976
Criminal 74-110

No. 75-1381

UNITED STATES OF AMERICA

v.

HARRY R. HALDEMAN, *Appellant*

No. 75-1382

UNITED STATES OF AMERICA

v.

JOHN D. EHRLICHMAN, *Appellant*

No. 75-1384

UNITED STATES OF AMERICA

v.

JOHN N. MITCHELL, *Appellant*

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: BAZELON, *Chief Judge*, and WRIGHT, McGOWAN, LEVENTHAL, ROBINSON, and MACKINNON, *Circuit Judges*, sitting *en banc*

Judgment

(Filed by October 12, 1976)

These causes came on to be heard by the Court sitting *en banc* and were argued by counsel. On consideration of the foregoing; it is

ORDERED AND ADJUDGED by this Court sitting *en banc* that the judgments of the District Court appealed from in these causes are hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court
GEORGE A. FISHER, *Clerk*

By: /s/ ROBERT A. BONNER
Robert A. Bonner,
Chief Deputy Clerk

Date: October 12, 1976
Opinion Per Curiam.

Opinion filed by Circuit Judge MacKinnon, dissenting in part and concurring in part.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Caption Omitted in Printing)

Order

(Filed December 8, 1976)

On consideration of appellants' petition for rehearing, it is

ORDERED by the Court, *en banc,* that the aforesaid petition for rehearing is denied.

Per Curiam

For the Court:

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk